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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, PETITIONER

v.

ETHEL MAE YAZELL, RESPONDENT

BRIEF FOR RESPONDENT

TO SAID HONORABLE COURT:

Respondent respectfully submits that the trial court judgment in this case should be affirmed on the basis of the record of evidence and pleadings actually made herein, as well as on the basis of applicable rules of law heretofore established by Congressional Act (including the regulations promulgated by the Administrator of Small Business Administration pursuant thereto), and by this Court.

STATEMENT

Respondent does not acquiesce in all of petitioner's statement of the case, and does not concede that the three questions presented by petitioner are actually or properly

before this Court for review. However, in the interest of brevity specification of the claimed deficiencies will be reserved for more appropriate places in the following discussion.

I.

THERE IS NO CONFLICT IN THIS CASE BETWEEN STATE AND FEDERAL LAW, INTERESTS, OR POWERS; NEITHER IS THERE ANY REAL ISSUE ABOUT WHETHER STATE OR FEDERAL LAW, AS SUCH, IS APPLICABLE TO THE CONTRACT IN QUESTION.

Any argument to the contrary notwithstanding, respondent does *NOT* contend that state law *AS SUCH* controls in this case. The note in question evidenced a disaster loan made to respondent's husband in 1957 by Small Business Administration pursuant to Section 636(b) of The Small Business Act of 1953, 67 Stat. 232, as amended, 15 U.S.C. 631, et seq. Viewed from the standpoint of *SOURCE* or *SOVEREIGNTY*, all legal questions arising from such transaction are federal questions, to be answered by reference to federal law *AS SUCH*. Despite any implication to the contrary in petitioner's argument, the State of Texas is not a party to this case, directly or indirectly; no interest of the State of Texas is involved herein, and by no stretch of any imagination can it be claimed that the State of Texas has ever attempted to impose any restriction or burden on the parties to this case in reference to any matter involved herein. Respondent's statement that the questions in this case are federal questions, to be answered by reference to federal law, should be sufficient to establish that there is not any real issue about whether state or federal law *AS SUCH* applies in this case.

Respondent does contend that the Texas rule of coverture is applicable to the contract involved in this case, not because it is state law, but rather because the local property rules, of which the rule of coverture is one, were adopted or absorbed by Congress, directly and indirectly, to be used as a part of the federal rules fixing the rights and obligations of the parties in this case, petitioner and respondent alike. This Court has long recognized that the Congress has the power to adopt, absorb or otherwise provide for federal use of local or state rules and laws as a part of a federal system. *United States v. 93.970 Acres of Land*, 360 U.S., 471, 79 S.Ct. 1193; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573; and *United States v. Miller*, 317 U.S. 369, 380, 63 S.Ct. 276, 283. Petitioner concedes that Congress has such power. (p. 9, petitioner's brief) Moreover, in every case cited by petitioner in support of its argument I the Court likewise recognized that Congress has such power.

II.

CONGRESS HAS ADOPTED, DIRECTLY AND INDIRECTLY, LOCAL PROPERTY RULES TO BE USED BY SMALL BUSINESS ADMINISTRATION AS APPROPRIATE FEDERAL RULES GOVERNING VALIDITY OF SECURITY INSTRUMENTS TO BE TAKEN BY IT FROM A PRIVATE ENTERPRISE.

The Small Business Act of 1953, as amended, contains no provision concerning legal competency of the borrower other than that it be a small business concern as defined in Section 632, or concerning the form or substance of the security instruments evidencing loans to be made by it, such as this one, other than to prescribe a maximum

interest rate and repayment period and that "* * * all loans made under the subsection [Section 636 (a) (7)] shall be of such sound value or so secured as reasonably to assure repayment."

There is no other body of federal law, legislative or otherwise, prescribing form or substance of notes and chattel mortgages, or legal competency of borrowers from Small Business Administration. Neither is there anything in the Act expressly or indirectly exempting security instruments to be taken by it from the requirements of the local property laws (in effect where each loan is made) governing validity thereof as in the case of all other lenders, nor depriving Small Business Administration of any of the benefits of such local property laws in reference to said matters. Essentially the same circumstances prevailed with respect to Reconstruction Finance Corporation, the predecessor of Small Business Administration.

Acceptance of the views urged by petitioner in this case necessarily means that these two agencies have continuously operated, with success, for some thirty-five years, making thousands of loans aggregating many millions of dollars (some of the statistics for which are given by petitioner on p. 12 of its brief, although none of said information appears in the record of this case) without the benefit, protection or guidance of any rules prescribing form or substance of its security instruments, or legal competency of its borrowers. This is unreasonable. Congress did not put these two agencies into the lending business without giving them the necessary tools. Instead the Act contains section 634 (b)(6), by which the Congress authorized

and directed the Administrator of Small Business Administration to

> "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter."

Pursuant thereto, the Administrator of Small Business Administration promulgated the following (among others) regulations, to-wit:

Regulation 122.17(f) reads as follows:

> "(f) Security may include: Mortgage on land, buildings and equipment; assignment of warehouse receipts for marketable merchandise stored in satisfactory warehouses; mortgage on chattels; or assignment of current receivables (accounts, notes or trade acceptances). The applicant may offer as additional collateral any other assets of sound value. A pledge of inventories generally will not be regarded as satisfactory collateral unless stored in a bonded or otherwise acceptable warehouse, *or unless the applicable State law provides for creating and maintaining a satisfactory lien upon inventory not so warehoused.*" (Emphasis supplied)

Regulation 123.7 (a) in reference to disaster loans reads as follows:

> "(a) The Small Business Act, as amended, contains no specific requirements with respect to collateral as security for a disaster loan, nor has SBA established any firm rule in regard to collateral. However, SBA requires applicants to pledge what-

> ever collateral they can furnish. SBA will give consideration the moral risk involved and to evidence showing a reasonable propsect that the loan will be repaid."

Such regulations have the same effect, in this situation, as the legislative Act itself. Since regulation #122.17(f) expressly incorporates the state law by reference, it is difficult to understand how petitioner is allowed to maintain the inconsistent position that it does in this case.

The loan in question was a disaster loan made pursuant to Section 636(b) of the Act, in which the Congress expressly empowered Small Business Administration to make such loans either "directly or in cooperation with banks or other lending institutions on an immediate or deferred basis." Since this Court does not give advisory opinions in advance, it seems indeed strange to expect "banks or other lending institutions" to participate in a loan transaction in which nobody knows in advance what covenants will be included in or excluded from the security instruments evidencing the same, or what standards to use to be sure the borrower is legally competent to contract.

Finally, this Court cannot ignore the fact that the contract documents involved in this case were executed in reference to Texas law, absorbed as it were as federal rules, there being none other available for determining the form or substance of the security instruments or competency of the borrower.

The note in question is a community debt of Delbert L. Yazell and his wife, who is the respondent, and the

property covered by the chattel mortgage to secure the note was community property (R.46).

Respondent's disabilities of coverture have not been removed.[1]

The note made the basis of this suit was secured by a chattel mortgage, both dated July 10, 1957, executed at Lampasas, Texas by respondent[2] and her husband and

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[1]Art. 4626, R.C.S.T. 1925, provided a method by which Respondent could have, but never did, free herself of the legal restrictions on transacting business. It read as follows:

"Any married woman, with the consent of and joined by her husband, may apply by written petition addressed to the district court of the county in which she may desire to transact business for judgment or orders of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes; such petition shall set out the causes which make it to the advantage of said married women to be so declared feme sole, and shall be led and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefore, and her contracts and obligations shall be binding on her."

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[2]There are several valid reasons for requiring the signature of the wife that are perfectly consistent with the concept of her non-personal liability in situations like this; an ilustrative example is the preclusion of possible future claims of separate-estate ownership of the property by the wife.

they were parts of the same transaction (Exhibit A, R. 3,25).

The chattel mortgage complied with the laws of the State of Texas as to substance and form. It was acknowledged before a Notary Public by respondent as a married woman on July 18, 1957, in full compliance with Texas law (R.35).

By express language (R.29,30) the chattel mortgage was executed in reference to Art. 4000, Revised Civil Statutes of Texas, as amended,[3] and thereby expressly authorized mortgagors to encumber the merchandise daily exposed for sale to the retail trade. The chattel mortgage also contains appropriate language to maintain the stock of merchandise in compliance with said Texas statute at all times (R.25,26).

The provisions of the Small Business Act of 1953 are clear, but they are no more so than its legislative history; the express incorporation of local property laws in petitioner's regulations is positive, but no more so than the

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[3]Art. 4000, Revised Civil Statutes of Texas reads as follows:

"Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise, daily exposed to sale, in parcels, in the regular course of business of such merchandise, and contemplating a continuance of the possession of said goods by said owner, shall be deemed fraudulent and void; provided that this Article shall not apply to farm products when offered for sale by the producer; and further provided that this Article shall not apply to any mortgage, deed of trust or other form of lien given to secure the purchase price of any such goods, wares or merchandise, except as to all retail sales made in good faith in the regular course of business."

express incorporation of the terms of Texas Property laws in and as a part of the contract on which petitioner sues in this case. The facts in this case are undisputed; those facts conclusively establish the basis for estoppel of petitioner, for holding it to the terms of its own regulations, its own interpretation of the Act, and to the express terms of its own contract. Surely the trial court judgment for respondent must be affirmed.

III.

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE PARTIES TO THE TRANSACTION (PETITIONER BEING ONE) CONTRACTED IN REFERENCE TO TEXAS LAW INSOFAR AS THE VALIDITY OF THE NOTE AND CHATTEL MORTGAGE WERE CONCERNED.

This point was discussed in the preceding argument as bearing upon the administrative interpretation of the Act by petitioner, and those comments will not be repeated here except by reference. Based upon that contract, petitioner sold all of the community property covered by the mortgage and applied the proceeds to the note in question. Petitioner has recovered a deficiency judgment against the husband, the lien of which extends to all property of the husband, including all of respondent's interest in any community property[4] owned or to be acquired by respondent and husband. Thus it is seen that neither petitioner's contracts nor remedies have been impaired.

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[4]"All such community property is reached by the judgment against the husband, it being unnecessary to name the wife in the judgment or the execution. *Gabb v. Boston*, 109 Tex. 193 SW 137; *Adams v. Bartell*, 102 SW 779 (782), err. ref.

IV.

THE TEXAS LAW OF COVERTURE IS APPROPRIATE AS THE FEDERAL RULE APPLICABLE TO THIS CASE, WHETHER IT BE ADOPTED BY LEGISLATIVE ACT, OR BY THE FEDERAL COURT.

A. THE TEXAS RULE OF COVERTURE

In general a Texas wife is not personally liable for community debt, and her separate estate cannot be taken (absent a mortgage thereon given by her) in satisfaction thereof. Arts. 4623 and 4626, Revised Civil Statutes of Texas; *Red River National Bank. v. Ferguson,* 109 Tex. 287, 206 SW 923 (1918); *Poe v. Hall,* 241 SW 708, 712; *Gooding v. Dove,* 262 SW 560.

The Texas Legislature has amended these statutes since the note in question was signed. Art. 4623 was repealed by Acts. 1963, 58th Leg., p. 1188, Cha. 472 # 4, the repeal becoming effective on August 23, 1963; Art. 4626 was amended by Acts 1963, 58th Leg. p. 1188, Ch. 472 likewise effective on August 23, 1963. The amended statutes reads:

> "A married woman shall have the same powers and capacity as if she were a feme sole, in her own name, to contract and be contracted with, sue and be sued, and all her separate property, her personal earnings and the revenues from her separate estate which is not exempt from execution under the laws of Texas shall thereafter be subject to her debts and be liable therefor, and her contracts and obligations shall be binding on her."

Of course, amendment of the statutes in 1963 would not alter the legal liability arising under the law as it

existed in 1957 at the time the note was signed and modified, but in any event the amendment does not abrogate the rule applicable to this case. The amendment authorizes a married woman to contract *"in her own name"* and create personal liability subjecting her separate estate, her personal earnings and the revenue from her separate estate to liability for such contracts made "in her own name" without her husband. It is believed that the amendment will be so construed, thus confining such personal liability to those instances where the married woman has contracted *in her own name* rather than simply joining, as wife, the husband in his contracts. This construction can be predicted with confidence because any other would alter or impair the exclusive control and management of the community estate by the husband, subjects entirely outside the scope of such amendments.

B. SUCH COVERTURE RULE IS APPROPRIATE AS THE FEDERAL RULE GOVERNING LOANS MADE IN TEXAS TO RESIDENTS OF TEXAS

The Texas coverture rule has been applied by federal courts as the appropriate federal rule in at least two earlier reported cases. *United States v Belt* 88F. Supp. 510 (1950, U.S.D.C.S.D. Tex.), and *Texas Water Suply Corp. v Reconstruction Finance Corp.* 204F 2d 190 (5th Cir. 1953). The federal lending program involved was not noticeably affected by the decisions. The important thing is that Congress has not thought that its declared policy of lending to private enterprise has been hampered by the federal agencies long-established use of state property laws for determining the form and substance of its security instru-

ments, and the legal competency of its borrowers. Such practice had been followed by Reconstruction Finance Corporation for more than twenty years when Congress enacted The Small Business Act of 1953, yet not a single change was made in that regard.

There is not one iota of evidence in this case that SBA's use of local property laws for determining validity of the security instruments it takes in the state where the loan is made has created any uncertainty, or interfered with its lending program, or impeded the declared public policy. In *Bumb, Trustee v United States,* 276 F 2d 729, the Court of Appeals for the 9th Circuit answered the same unsupported argument as follows: The Court there said,

> "We are unable to see in what manner local requirements governing the creation of a valid security interest interfere with federal policy to any greater degree than the requirement that the prospective borrower from the Small Business Administration meet other reasonable requirements before he becomes a debtor of the United States."

Moreover, it would appear that petitioner's appeal for establishment of a uniform system of federal property law separate and apart from that of the states where it operates, and which it has been using thus far, should be addressed to Congress before its use, instead of coming to this Court after the fact of its own selection of the state laws.

Neither does the judgment in this case interfere with

the relationship of the federal government with this respondent; it simply declares the rights of the parties as they existed at the time of contracting. Surely the rights of debtor-creditor parties would be fixed as of the time of the contract, whether there ever is a body of federal property law separate from state rules or not.

The claim that the judgment in this case discriminates against married women is as incorrect as it is far-fetched. Married women could engage in business in Texas in their own names before the 1963 amendment of the Texas Statute as well as since that event. Respondent could have qualified to do so had she desired, but since she did not do so, petitioner should justly be held to its own bargain of non-personal liability of respondent.

This case does not concern the federal revenues, commercial paper issued by the United States, its procurement policies, the national banking system, or any other area of activity where state and federal rules are incompatible. Neither does use of the community property rule involved in this case defeat, limit, impede, or burden any remedy of petitioner. It concerns only the question of validity—the legal liability of respondent as fixed by and as the result of the contract in question.

Coverture remains a useful and essential community property rule in Texas, and no dual rule should be imposed without most careful and deliberate forethought, more especially since no need or utility is shown therefor. The mischief that can result from doing so is perfectly illustrated by the experience of the Court of Appeals for

the 6th Circuit. In *Fetter V. United States,* 269 F 2nd 467, (6th Cir. 1959) it held that the wife was *not personally* liable on a FHA note she signed with her husband. In *United States V Helz,* 314 F 2nd 301, (6th cir. 1963) it held that she was. Both cases are being criticized, largely for what appears to be *unintended results.* See *Creditors' Rights* by Herbert N. Weingarten, in *Wayne Law Review* Vol. 10, p. 184 (1963). That court would have been far wiser, it seems to us, to have followed, in each of those cases, the course taken by this Court in *Reconstruction Finance Corp. V Beaver County,* 328 US 204, 66 S. Ct. 992 (1946), where this Court said,

> "We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes real property as long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits and laws."

We submit that the analogy to this case involving the community property laws as it does, is most apt.

CONCLUSION

The judgement should be affirmed and respondent respectfully so prays.

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